IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

AS MODIFIED: NOVEMBER 18, 2010
RENDERED: AUGUST 26, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 11-18-10 E.W.A.Grauth, D.C.

2009-SC-000207-MR

ROBERT RAY DAVIS — APPELLANT

V.

ON APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
NO. 07-CR-00396

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

REVERSING AND REMANDING

A Boyd County jury convicted Appellant, Robert Davis, of 23 counts of third-degree sodomy and sentenced him to twenty years' imprisonment. Appellant contests the jury instructions, which were identical on each count of sodomy, as well as the propriety of the judge's description of the crimes as "reprehensible." Due to the duplicative instructions on each count of sodomy, Appellant was deprived of the right to a unanimous verdict on any of the counts, and therefore his convictions are reversed.

I. Background

Following allegations by two minor boys, G.I. and M.B., in 2007 Appellant was indicted on 51 counts: 48 counts of third-degree sodomy of G.I.; one count of first-degree sodomy of G.I.; one count of attempted first-degree sodomy of M.B.; and one count of unlawful transaction with a minor, M.B. At

trial, both G.I. and M.B. testified about their sexual interactions with Appellant.

G.I. was born in 1988. He testified that his sexual encounters with Appellant began when he was in eighth grade. At that time, G.I. was either 14 or 15 years old. He described how the encounters initially involved each of them solely touching his own genitalia while the other watched. This progressed further at each encounter, until eventually they performed oral sex on each other. He could not say how many times they had engaged in oral sex, but that it happened a lot. G.I. also testified that after a couple more years, they had anal sex.

M.B. was born in 1995. He testified that his sexual encounters with Appellant began before he was 11 years old. M.B. described one specific occasion, in May 2006, when Appellant showed him a pornographic picture and asked if he wanted it. Appellant then asked M.B. if he wanted to play with his penis, but M.B. refused. M.B. testified that Appellant had done similar things to him before, including another time where he asked M.B. if he wanted to play with his penis and another time when Appellant offered him ten dollars for oral sex. Additionally, M.B. testified that Appellant told him how he had performed oral sex on G.I.

Appellant testified in his own defense at trial, denying any sexual contact with either child. However, the Commonwealth introduced Appellant's prior admissions to police that he had engaged in oral sex with G.I. 25 times in 2002, 23 times in 2003, eight times in 2004, and three times in 2005. In the interview, Appellant was very succinct as to the 25 sodomies in 2002. His

description of the 2003 sodomies was more deliberate, changing his estimate several times before ultimately concluding there were 23 instances. He also admitted to anal sex with G.I. in 2004. He was able to specifically identify several of the occasions. Appellant explained at trial that he had only admitted to these wrongdoings to provide police with what they wanted to hear.

Following trial testimony, the court instructed the jury on all 51 counts he was charged with. For each of the 48 third-degree sodomy charges, the instructions read exactly the same:

> You will find the Defendant guilty of Third Degree Sodomy under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:
>
> A. That in this County on or between the years 2002 through February 18, 2004 and before the finding of the Indictment herein, he engaged in deviate sexual intercourse with G.I.;
>
> AND
>
> B. That at the time of such intercourse, the Defendant was 21 years of age or older and G.I. was less than 16 years of age.

After receiving the instructions, the jury received permission to review the video of Appellant's admissions to determine how many instances of third-degree sodomy he had committed. After reviewing the video and deliberating further, the jury found Appellant guilty of the first 23 of the 48 counts and not guilty of the rest. It also found Appellant not guilty of first-degree sodomy of G.I., attempted sodomy of M.B., and unlawful transaction with a minor, M.B. He received a total sentence of twenty years and now challenges his convictions in this Court as a matter of right. Ky. Const. § 110(2)(b).

II. Analysis

Appellant contests his convictions on two grounds. His primary argument is that the undifferentiated instructions effectively denied him of his constitutional right to a unanimous verdict. Secondly, he argues that the trial judge's reference to his crimes as "reprehensible" unfairly prejudiced him in the eyes of the jury, denying him a fair trial.

Appellant first argues that his right to a unanimous verdict has not been satisfied as to any of the convictions. Appellant did not raise this concern at trial so it is subject to review only for palpable error. He reasons that because each of the 48 third-degree sodomy instructions was identical, there is no way to distinguish which instance of sodomy each referred to. Thus, there is no way to ascertain whether any of the 23 represents a specific instance of sodomy that all twelve jurors found to have occurred beyond a reasonable doubt. We agree.

It has long been clear in this Commonwealth that a defendant cannot be convicted of a criminal offense except by a unanimous verdict. *Cannon v. Commonwealth,* 291 Ky. 50, 163 S.W.2d 15, 15 (1942); *see also* Ky. Const. § 7; RCr 9.82(1). It is equally clear that without knowing which offense the jury as a whole has convicted on, it is impossible to tell which offense an individual juror voted to convict. Without the ability to identify on which offense each juror voted to convict, it is further impossible to determine whether they each voted to convict on the same offense, thereby preventing any assurance of a unanimous verdict. Putting it all together, ambiguity as to the offense on

which a jury has convicted interferes with a defendant's assurance of a unanimous verdict.

For that reason, this Court has recently held in *Miller v. Commonwealth*, 283 S.W.3d 690 (Ky. 2009), that the type of identical, undifferentiated instructions provided in this case violates a defendant's right to a unanimous verdict. In *Miller*, also involving a child sex-offender, the court issued "identical jury instructions for the six (6) counts of third-degree rape and two (2) counts of third-degree sodomy." *Id.* at 694. Similarly to the case at hand, the defendant in *Miller* was convicted of half of the third-degree rape and sodomy charges and acquitted of the rest. *Id.* at 694. "[B]ecause the trial court used identical jury instructions on multiple counts of third-degree rape and sodomy, none of which could be distinguished from the others as to what factually distinct crime each applied to, Appellant was presumptively prejudiced." *Id.* at 695-96. Because the Commonwealth did not rebut the prejudice, the convictions were all reversed. *Id.* at 696.

Here as well, there is no way to distinguish any of the 23 third-degree sodomy convictions from each other, or even from the 25 third-degree sodomy acquittals for that matter. Thus, there is no way to determine whether each or any of those convictions represents a determination by twelve jurors that Appellant committed a particular sodomy. It seems, therefore, that a direct application of *Miller* requires reversal in this case. *See Miller*, 283 S.W.3d at 694-96.

It is not coincidence that this error of identical instructions continues to resurface in child sex abuse cases. *See id.*; *Harp v. Commonwealth*, 266

S.W.3d 813, 819–21 (Ky. 2008); *Bell v. Commonwealth*, 245 S.W.3d 738, 744 (Ky. 2008); *Miller v. Commonwealth*, 77 S.W.3d 566 (Ky. 2002). In such cases it is often hard to pinpoint and differentiate the specific instances of the crime for several reasons: 1) The sole witness for the prosecution is typically a child who does not have the recollection ability of adults; 2) the events often occurred a significant amount of time in the past; 3) the abuse is often frequently repeated; and 4) there is generally not much to differentiate the many instances of abuse. For this reason, some states have adopted "continuing course of conduct with child" statutes. *See, e.g.,* Md. Criminal Law Code Ann. § 3-315 ("(a) Prohibited. -- A person may not engage in a continuing course of conduct which includes three or more acts that would constitute violations . . . with a victim who is under the age of 14 years at any time during the course of conduct."). Absent such a law in Kentucky, one cannot be convicted without unanimity as to a specific offense.

As in *Miller*, the convictions here are not saved by any implication drawn from the jury's verdict of acquittal on other counts. 283 S.W.3d at 694-96. Admittedly, the jury's unanimous decision to convict on 23 counts and acquit on 25 carries some suggestion of agreement by the jurors. It is certainly possible, based on their repeated viewing of the record and ultimate agreement to convict on 23 counts, that all twelve jurors determined that there were 23 specific sodomies beyond a reasonable doubt. Appellant had admitted to 23 sodomies in 2003 (along with 25 in 2002 and eight in 2004) and perhaps these 23 reflect the jury's 23 convictions.

If this were the only plausible explanation for the verdict, it may negate the prejudice stemming from the instructional error. However it is also possible that only some of the jurors believed Appellant committed the 23 sodomies in 2003, whereas others were only convinced of the 25 alleged sodomies in 2002. In that scenario, the two groups of jurors might well have agreed (improperly) that Appellant had at least committed 23 sodomies, and convicted him thereof. Of course, in such a scenario, none of the charged sodomies—in 2002 or 2003—would be endorsed by a unanimous jury. As such, there is a sufficient likelihood that Appellant was denied a unanimous verdict as to render the flawed instructions palpable error.

The Commonwealth's only response to this is to claim that Appellant affirmatively waived any right to receive proper instructions when defense counsel stated he had no objection to them. This, the Commonwealth insists, removes any problem in the instructions from even palpable error review. To support this claim, the Commonwealth cites *United States v. Olano*, 507, U.S. 725 (1993), *West v. Commonwealth*, 780 S.W.2d 600, 601, 603 (Ky. 1989), and other cases that hold that a party cannot complain on appeal if he was fully aware of the error, yet made a tactical decision not to object.

This argument fails, however, because there is no reason to believe that defense counsel knew of the error or that he declined to object for tactical reasons. There is no indication in the record that defense counsel realized the prejudice inherent in the instructions—how they deprived Appellant of his right to a unanimous verdict. Furthermore, there could be no tactical advantage from obtaining such instructions. Indeed, it is difficult to contemplate a

situation where a defendant would seek a tactical advantage by depriving himself of the right to a unanimous verdict. Thus, this Court cannot say that defense counsel's failure to object was a conscious, tactical decision; the only reasonable conclusion is that defense counsel failed to see the error, just like everyone else.

For that reason, *Miller* controls the disposition of this case. The instructions resulted in manifest injustice because they deprived Appellant of a unanimous verdict, and so his convictions must be reversed for palpable error. *Miller*, 283 S.W.3d at 694-96. As Appellant's second challenge to his convictions addresses a problem which is unlikely to recur on retrial, it need not be addressed here.

III. Conclusion

For the aforementioned reasons, Appellant's convictions in Boyd Circuit Court are hereby reversed and remanded for further proceedings consistent with this opinion.

Minton, C.J.; Abramson, Cunningham, Noble, Schroder and Venters, JJ., concur. Scott, J., dissents by separate opinion.

SCOTT, J., DISSENTING OPINION: I must respectfully dissent from a reversal of Appellant's convictions as the error here was plainly harmless. Appellant was charged with fifty-one counts, forty-eight of which were for third-degree sodomy. However, the jury convicted him of only twenty-three counts of third-degree sodomy, exactly the amount he had previously admitted to for 2003. This admission is the only evidence in this case that reflects the jury's twenty-three convictions. Moreover, the jury specifically asked to review this

testimony and did, prior to rendering its verdict. For this reason, unanimity should never be an issue. Thus, I dissent.

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ORDER GRANTING PETITION FOR MODIFICATION

Appellee's Petition for Modification of the Memorandum Opinion of the Court, rendered August 26, 2010, is granted. The opinion is hereby modified by substituting pages 1 and 8 of the opinion as attached hereton, in lieu of pages 1 and 8 of the opinion as originally rendered.

All sitting. All concur.

ENTERED: November 18, 2010.

CHIEF JUSTICE